

June 10, 2020

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
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Seattle, Washington 98104
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2708**
Proposed ordinance no. **2019-0490**
Adjacent parcel nos. **7202420090, 7202420100**

LAKE WASHINGTON SCHOOL DISTRICT

Road Vacation Petition

Location: A portion of NE 99th Place

Petitioner: Lake Washington School District
represented by **Denise Stiffarm**
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SUMMARY OF RECOMMENDATIONS:

Department's Recommendation:	Approve vacation, waive all compensation
Examiner's Recommendation:	Approve vacation, waive all compensation

FINDINGS AND CONCLUSIONS:

Overview

1. The Lake Washington School District (District) petitions the County to vacate an approximately 26,680-square foot, dead-end stretch of NE 99th Place that lies entirely inside Timberline Middle School (Timberline) grounds. The Department of Local Services, Road Services Division (Roads), recommends vacation and a waiver of all compensation. We conducted the public hearing on behalf of the Council. After hearing witness testimony, studying the exhibits entered into evidence, and considering the parties' arguments and the relevant law, we strongly recommend that Council approve the vacation and more mildly recommend that Council waive all compensation.

Background

2. Unlike most vacation petitions, which typically involve lines on a map, the subject right-of-way (99th) was constructed as a public road. It is currently maintained and used as a public road. It was originally designed to serve as an access connection to a business park (under the original urban planned development). Ex. 3 at 001, 004. However, the District currently occupies the whole surrounding area, making the terminal cul-de-sac and road a County cherry on a stem sticking into District property.
3. The District's plan for a vacated 99th is to install a gate near the midpoint. The eastern, gated-off, bulb end would primarily become a student recreation zone, although the gate could be opened to allow delivery, utility, or emergency vehicles to access. The western, Redmond Ridge Drive NE end would (in addition to occasional delivery, utility, or emergency vehicles) be the route school buses daily use to reach the school bus turnaround loop. *See* Ex. 25 at 001-04.
4. We held a prehearing conference on March 17. We then held a virtual public hearing on April 30. We kept the record open to address both parking and public access and also compensation. We received multiple supplemental filings.
5. Except as provided herein, we adopt and incorporate the facts set forth in Roads' report and in proposed ordinance no. 2019-0490. That report, and maps showing the specific area to be vacated and the vicinity of the proposed vacation, are in the hearing record and will be attached to the copies of our recommendation submitted to Council. Ex. 1 at 1-5; Ex. 8; Ex. 9; Ex. 25 at 1-4.

Is Vacation Warranted?

6. A petitioner has the burden to show that the "road is useless as part of the county road system and that the public will be benefitted by its vacation and abandonment." RCW 36.87.020. "A county right of way may be considered useless if it is not necessary to serve an essential role in the public road network or if it would better serve the public interest in private ownership." KCC 14.40.0102.B. While denial is mandatory ("shall not" vacate) where a petitioner fails to make that showing, approval is discretionary where a

petitioner shows uselessness and public benefit (“may vacate”). RCW 36.87.060(1) (emphasis added).

7. The road currently serves four sets of users. The first three are somewhat customary, as is the solution. The fourth is in a different category and has a more complex solution.
8. Utilities are a common concern in road vacations. Here, Puget Sound Energy (PSE) has gas and electric distribution lines in the right-of-way. Ex. 1 at 011-12. The District has already granted PSE an easement. Ex. 11.
9. Ensuring that vacation will not impact the provision of fire and emergency services is a critical part of the inquiry. Here, King County Fire District 34 uses 99th as fire access to the Timberline buildings. The fire district does not object to vacation, so long as the school maintains equivalent fire access. Ex. 1 at 013. Timberline will continue providing that access, post-vacation.
10. Property owners who use a to-be-vacated road to access their properties are also a major concern. Here, the Water Land and Resources Division of the Department of Natural Resources and Parks (WLRD) uses 99th to access its stormwater facilities, mainly a detention pond. Ex. 1 at 019. The District has granted and recorded an easement to the County to access these County stormwater facilities. Ex. 16. One concern on this topic we addressed at hearing is WLRD’s ability to get through the gate at times the school is closed, such as if there is some emergency involving the detention pond. The District is amendable to providing WLRD with key card or code access (depending on what gate the District winds up installing). Ex. 29 at 003.
11. The fourth is public parking and public access. That makes this petition somewhat unique.
12. The District routes the school’s primary site access, staff parking, and student drop-off/pickup to NE 102nd Street. As noted above, the District has designed 99th for busses to drop-off and pickup children. However, as 99th is currently a public road, private vehicles are allowed to drive it. The District asserts that 99th’s open status results in congestion and conflict with pedestrians and buses. The District also points to trespass from non-school users (such as campers hooking up to facilities in the back) and the District’s inability to protect against such intrusions. In addition, the District desires to use the cul-de-sac (east) end for physical education and recreational purposes. Ex. 24 at 002.
13. The County has refined the concept of “useless” to incorporate a road not serving “an essential role in the public road network.” KCC 14.40.0102.B. With the provision for continuing utility, fire, and stormwater facility access otherwise assured, the dead-end 99th serves no essential role in the public road “network.” Thus, the District has met the first part of the RCW 36.87.020 test, showing that the “road is useless as part of the county road system.” And there is a public benefit (the second part of the test) to allowing the District to manage and control access to school grounds and from County

- financial savings (discussed below). *See* Ex. 18; Ex. 29 at 014 (District’s amended site access plan).
14. However, two parents of Timberline students objected to vacation. One parent discussed using 99th as an alternative drop-off to avoid congestion on the main NE 102nd Street drop-off during normal drop-off/pickup times, and also noted how distant and inconvenient the main parking lot is from the tennis court/sports field/track for afterschool and weekend events and usage. Ex. 28. The other parent focused on picking up students after practice, noting that 99th is directly adjacent to the field, track, and tennis courts, while the main parking lot off 102nd has no sightlines to those athletic facilities; she noted that the buses only use 99th for very limited periods of time each (school) day, while 99th is widely used for parking and access by the community at all other times. Ex. 27. Public parking and access on 99th are countervailing public benefits *disfavoring* vacation.
 15. Allowing private vehicle access during school hours or in the cul-de-sac (east) end creates a zero-sum game of interests competing against school buses and recreation. However, that conflict disappears on the ungated west end on non-school days and on school days after the buses depart in the afternoon. An aerial view shows the commenters are correct that the main parking lot is far removed from the tennis courts/track/sports field, and not conducive to coordinating or executing afterschool pickups or after hours/weekend use. Ex. 24. at 010. We see little benefit to restricting vehicles once school buses are gone for the day, meaning parking/access prohibitions represent not a zero-sum game but instead a deadweight loss. At hearing, we probed the District for a plan to accommodate some of those parking/access needs on the west end during periods that would not conflict with the road’s primary use as school bus access.
 16. The District was responsive, drafting a parking easement in favor of the County. Ex. 29 at 006-12. However, Roads rejected this, explaining that while it appreciated the District’s efforts to address parking concerns, the County did not want to retain any associated obligations with the vacated portion, such as maintaining sign markings and providing parking enforcement. Ex. 30. We then asked the District to take another crack at it.
 17. The District responded again, this time with a Declaration of Covenants, Conditions and Restrictions (Declaration) that, when recorded, will provide public parking on the southwestern shoulder of what would become a private road and also in the turnaround loop used for public parking, for after school buses depart the school facility in the afternoon on school days, and any time on non-school days. Parking on the turnaround loop will automatically terminate if the loop is no longer used as a bus loop or for other school-related access. Otherwise, modification or termination of parking on either the bus loop or 99th will require the District’s Board of Directors to provide public notice of, and then hold, a public meeting to take testimony regarding the proposed change. Ex. 31 at 002.

18. The Declaration seems at least comparable to a County easement, since even an easement would not bind the County to keep public parking in perpetuity, whether or not the vacation goes through. And, unless we are missing something, the County is not in the practice of providing a public meeting with public input before it changes parking along public streets. Neither the Declaration, nor an easement, would permanently set parking in stone, but that seems like a good thing; creating an inflexible parking regime might, if conditions change in the future, do more harm than good.
19. There may be a slight public loss from vacation—in the form of private vehicle drop-off/pickup/parking during school hours. However, with the Declaration in place protecting afterhours/weekend parking access, the County saving an expected \$50,048 in avoided management, maintenance and liability costs, and with the District also taking over drainage (catch basins and piping) within the right-of-way itself (leaving no residual County responsibility), we conclude that the public will, on balance benefit from vacation, and that vacation is warranted. Ex. 18 at 001.
20. However, we note that road vacation is a political function that belongs to municipal authorities, a legislative act and not a quasi-judicial one.¹ Approval remains discretionary even where a petitioner shows uselessness and public benefit (“may vacate”). RCW 36.87.060(1). Thus, Council is well within its discretion not to vacate, if it so chooses.

What, If Any, Compensation Should Council Require?

21. The District and Roads argue that we and Council should waive all compensation. That is not surprising; the applicant and Roads *always* argue for a full waiver. Our independent compensation analysis has two subparts. First, what is the most accurate compensation figure, if the Council requires compensation. Second, should the Council require that compensation as a condition of vacation.

Compensation Calculation

22. Per the Assessor’s calculation, the right-of-way area is valued at \$13 a square foot. Ex. 17 at 001. Applying this to the right-of-way square footage results in an assessed value of \$346,840. Under the model Performance Strategy and Budget (PSB) crafted, subtracting out the \$50,048 in expected County savings for avoided management, maintenance and liability costs leaves a compensation figure of \$296,793. Ex. 18. *See also* RCW 36.87.120.
23. Neither the District nor Roads offered an alternative calculation to the \$50,048 County savings from vacation. However, the District did offer an appraisal for the starting point (i.e. an alternative to the \$346,840) from which to subtract those savings.
24. At hearing, we had probed the District on its statement that the vacated road would simply remain a road, just in private hands. We noted that this seemed true for the western half, where school buses and other vehicles would constantly drive, but not

¹ *Chilivist v. Okanogan County*, No. 34585–8–III, 2017 WL 1032774 at *4-5 (Wn. App. Mar. 16, 2017) (unpublished), *cert. denied*, 188 Wn. 2d 1022, 398 P.3d 1138 (Aug. 2, 2017).

- entirely true for the eastern half, as one purpose of the gate was to create an additional recreation area. *See* Ex. 25 at 001.
25. The District's appraiser addressed this, explaining that the easterly and westerly halves of the vacated road are conceptually different. The western half will remain a traditional street, with readily available vehicular access, especially during non-school bus hours (with public access to the school's athletic facilities and for pickup and parking for extracurricular activities). For this reason, he valued the western square footage at zero.
 26. The appraiser looked at the easterly half differently. The access control the gate provides confers the exclusive use one gets with ownership. However, the District's use is not exclusive, given the County's (WLRD's) and PSE's continuing interests. PSE has underground ownership (for its utility easements) and the District and WLRD share the surface rights. Underground easements are typically valued at 50% of fee value, leaving the surface rights with the remaining 50% of fee value.
 27. As to the surface rights, the appraiser noted that the District would be making frequent use of the street area for student recreation and crossing, while King County would be making infrequent use of the street area for their access. Therefore, he suggested dividing the surface rights value at 2/3 for the District and 1/3 for King County. Assuming the gate was precisely in the middle, the District's 2/3 share of half the road equates to 1/3 share of the entire road.
 28. The appraiser's full report is pages 21-26 of exhibit 29. We find the appraiser's approach clear and well-supported. We adopt it here.
 29. The District opined that the appraisal would translate into a compensation figure of \$48,971. Ex. 29 at 003. That both overstates and understates the figure. It overstates things because, taking out a ruler (our high-tech prowess is indeed impressive) and measuring the linear extent of the right-of-way, the gated easterly area is little less than half the total vacation area, approximately 45%. This means the District's share (under the appraiser's methodology) would be 30%, not 33.33%. It understates things because the District started from the \$296,793 figure (the number derived from the assessed value minus the County's cost saving) and not from the assessed value itself (\$346,840). Ex. 18.
 30. Instead, we think the appropriate application of the appraiser's approach is to start with the raw assessed value of \$346,840, and multiply this by .30. Then, take that \$104,052 product and subtract the \$50,048 in expected County savings for avoided management, maintenance and liability. That results in \$54,004, which we conclude represents the most accurate compensation figure. There is no further subtraction for "limits on development," RCW 36.87.120, because the appraiser's methodology already captures these limits; we do double-count.

Should Compensation Be Required?

31. That does not mean that Council should require compensation here. What animated our concerns in earlier cases was Roads’ policy decision to give away public rights-of-way to *private* interests, raising the specter of the constitutional prohibition against gifting public property to private interests.² That set in motion a long saga that culminated in PSB creating a sound model for approaching vacation compensation questions. Applying that methodology, along with the appraiser’s added input here, results in the \$54,004 figure discussed above.
32. However, Timberline Middle School is not private property, and the District is not a private interest. The vacation area will remain a road and also be used as a recreation area for students and other public users. Public school facilities are an essential part of the public infrastructure and enhance educational opportunities for children, a recognized public good. KCCPP PF-19; Comp. Plan F-215. Safe site circulation and pedestrian access is also a public benefit. And state law specifically authorizes the Council to downwardly adjust compensation in the road vacation context to reflect “future public benefit.” RCW 36.87.120.
33. This issue turns on whether—where the application involves vacating right-of-way for a public applicant, and where the vacated area will continue be used exclusively for public use—compensation is appropriate.
34. This has come up twice before on our watch. In *V-2669–King County Water and Land Resources Division (WLRD)*, we “tepidly” recommended that Council waive all compensation for public right-of-way being vacated to provide a salmon recovery and habitat conservation area.³ There, Council went the other direction, requiring WLRD to fully compensate Roads. Ord. 18571 at lines 48-53.
35. In *V-2703–King County Department of Natural Resources and Parks* we concluded that “while Council may want to take our recommendation off the consent agenda and study it, we think [Roads] transferring the right-of-way to Parks [to use as a public park] without compensation is probably appropriate.”⁴ Council agreed, and waived compensation. Ord. 18604.
36. We do not pretend to fully grasp funding ‘pots’ and when it is acceptable for one governmental entity to pay or not pay for something received from another governmental entity. We have only a rudimentary understanding of the Accountancy Act

² “No county...shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm....” WASH. CONST., art. VIII, § 7.

³ https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2017/V-2669_KingCountyWaterAndLandResourcesDivision.ashx?la=en. We chose our words carefully there, writing “tepidly” (i.e., showing little enthusiasm) because we were concerned with the way WLRD and Roads had approached the process. We have no such concerns with today’s application.

⁴ https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2017/V-2703_DNRP_REPLACEt.ashx?la=en.


and where and how it applies; others in the Council have a significant leg up on us, as the issue arises outside the road vacation context.

37. However, we note that, in the vacation context specifically, compensation is not necessarily required, be the recipient public or private. The state statute declares that a local vacation ordinance “*may* require that compensation for the vacation of county roads...equal all *or a percentage of* the appraised value of the vacated road.” RCW 36.87.120 (italics added). *See also* KCC 14.40.020.A.1 (“compensation may be required”). In pushing back against Roads’ insistence to waive compensation across the board in our previous recommendations to Council, we never framed requiring compensation as a mandatory legal duty but as a policy choice for Council to weigh. That seems even more true where the recipient of the right-of-way area is a public entity.
38. Finally, while all road vacations are legislative acts,⁵ vacation being a “political function” seems to carry added weight when answering such government-to-government questions. And because state law specifically authorizes a local legislative body to adjust compensation in the road vacation context to reflect “future public benefit,” RCW 36.87.120, the Council’s latitude seems broad here. So, while we recommend a full waiver of compensation to reflect the public benefits from vacation here, our opinion on this specific policy choice should carry less weight than (we hope) it usually does.

RECOMMENDATION:

APPROVE proposed ordinance no. 2019-0490, vacating the subject road right-of-way, without compensation, but conditioned on the District recording the Declaration (exhibit 31) and on the District providing WLRD and the fire district with keyed or coded gate access (exhibit 29 at 003).

DATED June 10, 2020.



David Spohr
Hearing Examiner

⁵*Chilwist v. Okanogan County*, No. 34585–8–III, 2017 WL 1032774 at *4-5 (Wn. App. Mar. 16, 2017) (unpublished), *cert. denied*, 188 Wn. 2d 1022, 398 P.3d 1138 (Aug. 2, 2017).

NOTICE OF RIGHT TO APPEAL

A person appeals an Examiner recommendation by following the steps described in KCC 20.22.230, including filing with the Clerk of the Council a sufficient appeal statement and a \$250 appeal fee (check payable to the King County FBOD), and providing copies of the appeal statement to the Examiner and to any named parties listed on the front page of the Examiner’s recommendation. Please consult KCC 20.22.230 for exact requirements.

Prior to the close of business (4:30 p.m.) on **July 6, 2020**, an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov and a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if the Clerk does not actually receive the fee and the appeal statement within the applicable time period.

Unless the appeal requirements of KCC 20.22.230 are met, the Clerk of the Council will place on the agenda of the next available Council meeting a proposed ordinance implementing the Examiner’s recommended action.

If the appeal requirements of KCC 20.22.230 are met, the Examiner will notify parties and interested persons and will provide information about “next steps.”

**MINUTES OF THE APRIL 30, 2020, HEARING ON THE ROAD VACATION
PETITION OF LAKE WASHINGTON SCHOOL DISTRICT, DEPARTMENT OF
TRANSPORTATION FILE NO. V-2708**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Leslie Drake, Denise Stiffarm, and Brian Buck. The following exhibits were entered into the hearing record:

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|----------------|--|
| Exhibit no. 1 | Roads Services report to the Hearing Examiner including 14 attachments, sent March 3, 2020 |
| Exhibit no. 2 | Letter from Clerk of the Council to KCDOT transmitting petition, dated December 1, 2016 |
| Exhibit no. 3 | Petition for vacation of a county road, transmitted December 1, 2016 |
| Exhibit no. 4 | Final notice sent to Stakeholders on January 20, 2017, with vacation area map |
| Exhibit no. 5 | Letter from KCDOT to Petitioner, dated July 13, 2017 |
| Exhibit no. 6 | Road Engineer report |
| Exhibit no. 7 | Letter from KCDOT to Petitioner acknowledging receipt of petition, dated December 21, 2016 |
| Exhibit no. 8 | Site Map |
| Exhibit no. 9 | Aerial Map |
| Exhibit no. 10 | Letter from Denise L. Stiffarm, transmitting the original signed easement and the Declaration of Covenant, dated February 26, 2019 |
| Exhibit no. 11 | Easement from Lake Washington School District to Puget Sound Energy |
| Exhibit no. 12 | Access easement from Lake Washington School District to King County |
| Exhibit no. 13 | Declaration of Covenant for inspection and Maintenance of Stormwater Facilities and BMPS from Lake Washington School District |
| Exhibit no. 14 | Letter to Denise Stiffarm regarding release of original easement from King County to Petitioner for recording, dated July 28, 2019 |
| Exhibit no. 15 | Email from Petitioner’s counsel transmitting a copy of the recorded easement in favor of King County, dated July 29, 2019 |
| Exhibit no. 16 | Recorded Access Easement in favor of King County |
| Exhibit no. 17 | Email from Jeffrey Darrow with valuation information, dated July 5, 2019 |
| Exhibit no. 18 | Compensation calculation model spreadsheet |
| Exhibit no. 19 | Letter from KCDOT to KC Council recommending approval and transmitting proposed ordinance, dated November 26, 2019 |
| Exhibit no. 20 | Proposed ordinance |
| Exhibit no. 21 | Fiscal note |
| Exhibit no. 22 | Photographs of NE 99 th Place |
| Exhibit no. 23 | Affidavit of <i>Notice of Hearing</i> publication, noting posting date of February 21, 2020 |

- Exhibit no. 24 Applicant: Letter and declaration of Brian Buck, submitted March 10, 2020
- Exhibit no. 25 Applicant: Photographs of Timberline Middle School, submitted April 22, 2020
- Exhibit no. 26 Department: Declaration of *Notice of Rescheduled Hearing* publication, noting posting date of April 2, 2020
- Exhibit no. 27 Department: Email from Christina Bennett, dated March 18, 2020
- Exhibit no. 28 Department: Email from Jen Boon, dated March 16, 2020
- Exhibit no. 29 Applicant: Supplemental materials, received May 11, 2020
- Exhibit no. 30 Department: Rebuttal response to Applicant, received May 22, 2020
- Exhibit no. 31 Applicant: Public Parking Declaration – Revised Attachment A, received May 27, 2020

DS/jf